Yap Yew Cheong & Anor v Dirga Niaga (Selangor) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6–22–533 OF 2004
ABDUL MALIK ISHAK J
12 AUGUST 2005

Civil Law Act — Interest — Compounded interest — Award of interest of 8%pa on judgment sum which was the default interest of 12%pa — Whether court could award interest — Civil Law Act 1956 s 11

Contract — Damages — Liquidated damages — Failure to deliver letter of disclaimer within stipulated period — Clause in contract provided that aggrieved party entitled to 12% interest for the delayed duration — Whether penalty — Whether penalty clause invalid — Whether proof of actual damage required — Contracts Act 1950 s 75

Contract — Interest — Imposition of default interest — Agreed penalty interest of 12%pa provided in agreements — Whether interest excessive — Contracts Act 1950 s 75

Evidence — Burden of proof — Allegation of particular fact — Penalty clause — Whether onus of showing that the sum is a penalty lies on the party being sued

This was an appeal by the defendant against the learned senior assistant registrar's ('SAR') decision in favour of the plaintiffs' summary application pursuant to O 14 of the Rules of the High Court 1980 ('RHC'). The appeal centred on three agreements entered into between the plaintiffs and the defendant. These agreements were not the standard sale and purchase agreements under the Housing Developers (Control and Licensing) Regulations 1989 made under the Housing Developers (Control and Licensing) Act 1966. In fact, these three agreements were 'set-off' agreements entered into for purposes of setting-off all the debts due from Europlus Corp Sdn Bhd to WCT Engineering Bhd. The defendant was an associate or a subsidiary to Europlus Corp Sdn Bhd while the plaintiffs were the directors of WCT Engineering Bhd. These three agreements were drafted by the plaintiffs' solicitors and they were, incidentally, the solicitors representing the plaintiffs in this action. It was a term in these agreements that the defendant shall within six months from 23 January 1998 (the date of the sale and purchase agreements) redeem the said parcels and deliver to the plaintiffs a letter of disclaimer failing which the defendant shall pay to the plaintiffs as purchasers 12% interest on daily rests on the purchase price from the expiry of the six months to the date of actual redemption ('LAD'). The plaintiffs purchased Parcel No F 10 at RM371,200 with LAD at RM146,323.98, Parcel No F 41 at RM328,900 with LAD at RM129,649.67 and Parcel No F 42 at RM328,900 with LAD at RM129,649.67. The total LAD came up to RM405,623.32. It was undisputed that the letter of disclaimer was dated 5 November 2001 and the delay was from 22 July 1998 to 5 November 2001 which came up to 1,199 days for the three units. The defendant argued

that, inter alia: (a) the plaintiffs were enforcing a penalty clause which was invalid by virtue of s 75 of the Contracts Act 1950; and (b) the plaintiffs were claiming compounding interest by imposing 8% upon 12% which was said to be contrary to s 11 of the Civil Law Act 1956.

Held, dismissing defendant's appeal with costs:

(1) The distinction between liquidated damages and penalty was of no significance. It was of no legal importance simply because it was the duty of the court in either case to determine the quantum of what was the reasonable compensation to be handed out (see para 12).

(2) It is wrong to say that a penalty clause is invalid by virtue of s 75 of the Contracts Act 1950. Both the liquidated damages and penalties exist side by side. In liquidated damages, there will be a genuine pre-estimate of the loss that will be caused to one party in a situation where the contract is broken by the other. It is this liquidated damages that would be recoverable and it requires no proof of actual damage. Whereas a penalty clause is always subject to the equitable jurisdiction of the court. So, the courts of equity would always ensure that a promisee is sufficiently compensated for his actual loss (see paras 12 and 14).

(3) The onus of showing that the specified sum was a penalty lied upon the shoulders of the party who was being sued for its recovery (see para 13).

(4) It was wrong to say as was said by the defendant that a penalty clause was invalid in Malaysia in the context of s 75 of the Contracts Act 1950. In Malaysia, the distinction between liquidated damages and penalties had no significance. It had been put into oblivion by s 75 of the Contracts Act 1950 (see para 14).

(5) The plaintiffs did not have to show any proof of loss or damage because the plaintiffs' claim against the defendant fell under the first class of cases as postulated by Abdul Aziz Mohamed J in *Sakinas Sdn Bhd v Siew Yik Hau & Anor* [2002] 5 MLJ 497 in that where there was no evidence of actual damage or loss, the court ought, nevertheless, to award substantial damages not exceeding the sum so named in the contractual provision being the sum which was reasonable and fair according to the court's good sense and fair play. Here, there were some real loss inherently and that such loss was not too remote. However, it would be difficult for the court to assess damages or the actual damage or loss because there was no known measure of damages employable (see para 25).

(6) In construing s 75 of the Contracts Act 1950, the court must accord it a literal, plain and ordinary interpretation. According to that section, if an amount is named in a contract as an amount to be paid in case of a breach or if the contract contains any other stipulation by way of a penalty, then the party complaining of the breach is entitled to receive

a reasonable compensation not exceeding the amount so named or the penalty stipulated therein. This is so irrespective of whether or not actual damage or loss is proved to have been caused or incurred (see para 26).

(7) The liquidated damages clause will smoothen the evidential path of the injured party. A fixed sum is set and the injured party is thereby entitled to it. There is nothing illegal about liquidated damages. They are legally valid. Its sole purpose is to compensate the injured party for his loss and proof of actual loss is dispensed with. But if an injured party fixes a sum of money not as a compensation but rather as a punishment, then it will not be considered as liquidated damages but rather as a penalty. Penalties are legally invalid because they serve to punish the contract breaker and not to compensate the injured party for his loss. Section 75 of the Contracts Act 1950 does not render invalid a penalty clause and the injured party too is entitled to a reasonable compensation or the penalty as specified therein 'whether or not actual damage or loss is proved to have been caused thereby' (see paras 33–34).

(8) The court agreed with the plaintiffs' stand that the said clause was not a penalty clause and that the plaintiffs were not required to prove the losses suffered by them before they could claim the monetary damages. Even if the said clause was said to be a penalty clause, the plaintiffs did not have to prove the losses that they had suffered before they could claim the monetary damages because the so called penalty clause was a term of an agreement entered into mutually between the plaintiffs and the defendant and thus, under the law, binding and enforceable against both the parties (see para 36).

(9) It is now settled law that the plaintiffs could claim for pre-judgment and post-judgment interests. In regard to the post-judgment interest, from the date of judgment until the date of realisation the plaintiffs were entitled to 8% on the judgment debt computed and comprised of the principle sum plus the judgment interest pursuant to O 42 r 12 of the RHC (see para 37).

(10) The plaintiffs were claiming against the defendant for damages for breach of the agreements. The 12% of the purchase price claimed by the plaintiffs were not interest per se, rather it was more of a quantum on which the damages were calculated upon. In short, the plaintiffs were not claiming compound interest as alleged by the defendant but rather the plaintiffs were claiming the interest of 8% upon the 12% of which they were entitled to (see paras 38–39).

[Bahasa Malaysia summary

Ini adalah rayun oleh defendan terhadap keputusan penolong kanan pendaftar ('PKP') yang bijaksana yang menyebelahi permohonan terus plaintif-plaintif

menurut A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Rayuan berkisarkan tiga perjanjian yang dimasuki antara plaintif-plaintif dan defendan. Perjanjian-perjanjian tersebut bukan merupakan perjanjian jualbeli yang standard di bawah Peraturan Pemaju Perumahan (Kawalan dan Pelesenan) 1989 yang digubal di bawah Akta Pemaju Perumahan (Kawalan dan Pelesenan) 1966. Bahkan, perjanjian-perjanjian tersebut merupakan perjanjian-perjanjian 'set-off' yang dimasuki bagi tujuan menolak semua hutang yang perlu dibayar daripada Europlus Corp Sdn Bhd kepada WCT Engineering Bhd. Defendan merupakan syarikat bersama atau anak syarikat Europlus Corp Sdn Bhd sementara plaintif-plaintif merupakan pengarah-pengarah WCT Engineering Bhd. Ketiga-tiga perjanjian tersebut didraf oleh peguamcara plaintif-plaintif dan mereka, secara tak langsung, adalah peguamcara yang mewakili plaintif-plaintif dalam tindakan ini. Wujud satu terma dalam perjanjian-perjanjian tersebut yang mana defendan hendaklah dalam tempoh enam bulan dari 23 Januari 1998 (tarikh perjanjian-perjanjian jualbeli tersebut) menebus parcel dan diserahkan kepada plaintif-plaintif sebagai pembeli-pembeli 12% faedah setiap hari berdasarkan harga belian dari tarikh luput enam bulan hingga tarikh penebusan sebenar ('LAD'). Plaintif-plaintif telah membeli Parcel No F 10 pada harga RM371,200 dengan LAD pada harga RM146,323.98, Parcel No F 41 pada harga RM328,900 dengan LAD pada harga RM129,649.67 dan Parcel No F 42 pada harga RM328,900 dengan LAD pada harga RM129,649.67. Keseluruhan LAD mencecah sejumlah RM405,623.32. Tidak dipertikaikan bahawa surat penolakan tuntutan bertarikh 5 November 2001 dan kelewatan berlaku dari 22 Julai 1998 hingga 5 November 2001 yang merupakan 1,199 hari bagi ketiga-tiga unit tersebut. Defendan berhujah bahawa, antara lain: (a)plaintif-plaintif telah menguatkuasakan satu fasal penalti yang tidak sah menurut s 75 Akta Kontrak 1950; dan (b) plaintif-plaintif menuntut faedah kompaun dengan mengenakan 8% ke atas 12% yang dikatakan bertentangan dengan s 11 Akta Undang-Undang Sivil 1956.

Diputuskan, menolak rayuan defendan dengan kos:

(1) Perbezaan antara ganti rugi boleh dikira dan penalti tidak ketara. Ia tidak penting di sisi undang-undang kerana ia adalah tanggungjawab mahkamah dalam mana-mana kes untuk menentukan kuantum untuk memberikan pampasan yang berpatutan (lihat perenggan 12).

(2) Adalah salah untuk mengatakan bahawa suatu fasal penalti adalah tidak sah menurut s 75 Akta Kontrak 1950. Kedua-dua ganti rugi boleh dikira dan penalti saling wujud. Dalam ganti rugi boleh dikira, terdapat kerugian sebenar yang telahpun dianggarkan yang akan berlaku ke atas satu pihak dalam keadaan di mana kontrak telah dimungkiri oleh pihak yang lain. Ganti rugi boleh dikira ini dapat diperolehi dan ia tidak memerlukan bukti kerugian sebenar. Manakala fasal penalti sentiasa tertakluk kepada bidang kuasa saksama mahkamah. Jadi, mahkamah kesaksamaan akan

sentiasa memastikan orang yang dijanjikan diberi pampasan secukupnya untuk kerugian sebenarnya (lihat perenggan 12 dan 14).

(3) Beban untuk menunjukkan bahawa jumlah yang ditetapkan adalah satu penalti terletak ke atas pihak yang disaman untuk pengembaliannya (lihat perenggan 13).

(4) Adalah salah untuk mengatakan seperti yang dinyatakan oleh defendan bahawa satu fasal penalti adalah tidak sah Malaysia dalam konteks s 75 Akta Kontrak 1950. Di Malaysia, tiada perbezaan antara ganti rugi boleh dikira dan penalti. Ia diketepikan oleh s 75 Akta Kontrak 1950 (lihat perenggan 14).

(5) Plaintif-plaintif tidak perlu menunjukkan bukti kerugian atau kerosakan kerana tuntutan plaintif-plaintif terangkum di bawah kelas pertama kes-kes yang dipostulatkan oleh Abdul Aziz Mohamed H dalam *Sakinas Sdn Bhd v Siew Yik Hau & Anor* [2002] 5 MLJ 497 di mana jika tiada bukti kerosakan atau kerugian sebenar, mahkamah hendaklah, bagaimanapun, mengawardkan ganti rugi yang besar melebihi jumlah yang dinyatakan dalam peruntukan kontraktual yang merupakan jumlah yang munasabah dan adil menurut sikap pertimbangan dan adil mahkamah. Di sini, terdapat kerugian yang memang nyata dan kerugian sedemikian tidak begitu sedikit. Namun begitu, adalah sukar untuk mahkamah mengira ganti rugi atau kerosakan atau kerugian sebenar kerana tiada ukuran ganti rugi yang boleh digunakan (lihat perenggan 25).

(6) Dalam menafsir s 75 Akta Kontrak 1950, mahkamah perlu memberikan penafsiran yang harfiah, jelas dan biasa. Menurut seksyen tersebut, jika satu jumlah dinyatakan dalam kontrak sebagai satu jumlah yang perlu dibayar sekira berlaku perlanggaran atau jika kontrak mengandungi apa-apa penetapan lain melalui penalti, maka pihak yang mengadu tentang perlanggaran itu berhak menerima pampasan yang berpatutan tidak melebihi jumlah yang dinyatakan atau penalti yang ditetapkan tersebut. Ini tidak mengambilkira sama ada atau tidak kerosakan atau kerugian sebenar telah dibuktikan berlaku atau ditanggung (lihat perenggan 26).

(7) Fasal ganti rugi boleh dikira akan melancarkan tuntutan pihak yang terkilan. Satu jumlah telah ditetapkan dan pihak yang terkilan berhak ke atasnya. Tiada apa-apa yang menyalahi undang-undang tentang ganti rugi boleh dikira. Ia sah di sisi undang-undang. Tujuan utamanya adalah untuk memberi pampasan kepada pihak yang terkilan kerana kerugiannya dan bukti kerugian sebenar tidak diperlukan. Namun jika pihak yang terkilan menetapkan satu jumlah wang yang bukan sebagai satu pampasan tetapi lebih kepada satu hukuman, maka ia tidak akan dianggap sebagai ganti rugi boleh dikira tetapi sebagai satu penalti. Penalti adalah tidak sah di sisi undang-undang kerana ia berfungsi untuk menghukum yang melanggar kontrak dan tidak memberi pampasan kepada pihak yang

mengalami kerugian. Seksyen 75 Akta Kontrak 1950 tidak menjadikan satu fasal penalti itu tidak sah dan pihak yang terkilan juga berhak mendapat pampasan yang berpatutan atau penalti seperti yang ditetapkan 'whether or not actual damage or loss is proved to have been caused thereby' (lihat perenggan 33–34).

(8) Mahkamah bersetuju dengan pendirian plaintif-plaintif bahawa fasal tersebut bukan satu fasal penalti dan bahawa plaintif-plaintif tidak perlu membuktikan kerugian yang dialami oleh mereka sebelum mereka boleh menuntut ganti rugi berbentuk wang. Meskipun fasal tersebut dikatakan satu fasal penalti, plaintif-plaintif tidak perlu membuktikan kerugian yang mereka alami sebelum mereka boleh menuntut ganti rugi berbentuk wang kerana fasal penalti yang dikatakan itu merupakan satu terma dalam perjanjian yang dimasuki bersama antara plaintif-plaintif dan defendan dan oleh itu, di sisi undang-undang, adalah mengikat dan berkuatkuasa terhadap kedua-dua pihak (lihat perenggan 36).

(9) Adalah undang-undang tetap kini yang plaintif-plaintif boleh menuntut faedah-faedah pra penghakiman dan selepas penghakiman. Berhubung faedah selepas penghakiman, dari tarikh penghakiman hingga tarikh realisasi plaintif-plaintif berhak mendapat 8% ke atas hutang penghakiman yang dikira dan merangkumi jumlah utama juga faedah penghakiman menurut A 42 k 12 KMT (lihat perenggan 37).

(10) Plaintif-plaintif menuntut terhadap defendan untuk ganti rugi kerana perlanggaran perjanjian-perjanjian tersebut. Tuntutan 12% daripada harga belian oleh plaintif-plaintif bukan hanya faedah semata-mata, tetapi merupakan kuantum untuk mengira ganti rugi tersebut. Pendek kata, plaintif-plaintif tidak menuntut faedah kompaun sepertimana yang didakwa oleh defendan tetapi plaintif-plaintif menuntut faedah 8% atas 12% yang mereka mempunyai hak ke atasnya (lihat perenggan 38–39).]

Notes

For cases on allegations of a particular fact, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 333–337.

For a case on compounded interest, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) para 3342.

For cases on imposition of default interest, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3760–3762.

For cases on liquidated damages, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2903–2923.

Cases referred to

Barnes v Jarvis [1953] 1 WLR 649 (refd)
Barrell v Fordree [1932] AC 676 (refd)

Bridge v Campbell Discount Co Ltd [1962] AC 600; [1962] 1 All ER 385 (refd)
Bulsing Ltd v Joon Seng & Co [1972] 2 MLJ 43 (refd)
Bushwall Properties Ltd v Vortex Properties [1975] 2 All ER 214 (refd)
Capper v Baldwin [1965] 2 QB 53 (refd)
Choo Yin Loo v SK Visuvalingam Pillay (1930) 7 FMSLR 135 (refd)
Corocraft v Pan-Am [1969] 1 QB 616 (refd)
Croxford v Universal Insurance Co [1936]) 2 KB 253 (refd)
Dunlop Pneumatic Tyre Co, Ltd v New Garage & Motor Co Ltd [1914-15] All ER Rep 739 (refd)
Hua Khiow Steamship Co Ltd, The v Chop Guan Hin (1930) 1 MC 175, 1 JLR 33 (refd)
Hudson, Re (1885) 54 LJ Ch 811 (refd)
Kidder v West (1684) 3 Lev 167 (refd)
Law v Redditch Local Board [1982] 1 QB 127 (refd)
Linggi Plantations Ltd v Jagatheesan [1972] 1 MLJ 89 (refd)
Lombank Ltd v Excell [1963] 3 All ER 486 (refd)
Monypenny v Monypenny (1861) 9 HLC 114 (refd)
Pagnan SPA v Feed Products [1987] 2 Lloyd's Rep 601 (refd)
Phoenix Heights Estate (Pte) Ltd v Lee Kay Guan [1982] 2 MLJ 86 (refd)
Public Works Comr v Hills [1906] AC 368 (refd)
Pusat Bandar Damansara Sdn Bhd & Anor v Yap Han Soo & Sons Sdn Bhd [2000] 1 MLJ 513 (folld)
R v Commissioners of Income Tax (1888) 22 QBD 296 (refd)
R v Ramsgate (Inhabitants) (1834) 1 A & E 136 (refd)
RHB Sakura Merchant Bankers Bhd v Tan Sri Dato' Ting Pek Khiing (No 1) [2004] 5 MLJ 315 (folld)
Robophone Facilities Ltd v Blank [1966] 1 WLR 1428 (refd)
SS Maniam v The State of Perak [1957] MLJ 75 (refd)
Sakinas Sdn Bhd v. Siew Yik Hau & Anor [2002] 5 MLJ 497 (refd)
Sarwari a/p Ainuddin v Abdul Aziz a/l Ainuddin [2000] 5 MLJ 391 (refd)
Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817 (dist)
Victoria City Corp v Bishop of Vancouver Island [1921] 2 AC 384 (refd)
Wall v Rederiaktiebolaget Luggude [1915] 3 KB 66 (refd)
Wallis v Smith (1882) 21 Ch D 243 (refd)
Warburton v Loveland (1832) 2 D & Cl (HL) 480 (refd)
Watt, Watts & Co Ltd v Mitsui & Co Ltd [1917] AC 227 (refd)
Wearne Bros (M) Ltd v Jackson [1966] 2 MLJ 155 (refd)
Wee Wood Industries Sdn Bhd v Guannex Leasing Sdn Bhd [1990] 2 CLJ 1060 (refd)

Legislation referred to

Civil Law Act 1956 s 11
Contracts Act 1950 s 75
Housing Developers (Control and Licensing) Act 1966
Housing Developers (Control and Licensing) Regulations 1989 reg 11
Rules of the High Court 1980 O 14, O 42 r 12

Jashirita Mohd Bashir (Yip & Co) for the plaintiff.
Seah Ban Kiat (Yeap & Yong) for the defendant.

Abdul Malik Ishak J:

INTRODUCTION

[1] This is an appeal by the defendant in enclosure 13 against the learned senior assistant registrar's ('SAR') decision in favour of the plaintiffs' summary application pursuant to O 14 of the Rules of the High Court 1980 ('RHC').

[2] Factually speaking, the appeal centred on three agreements entered into between the plaintiffs and the defendant. These agreements are not the standard sale and purchase agreements under the Housing Developers (Control and Licensing) Regulations 1989 made under the Housing Developers (Control and Licensing) Act 1966. In fact, these three agreements are 'set-off' agreements entered into for purposes of setting-off all the debts due from Europlus Corp Sdn Bhd to WCT Engineering Bhd. The defendant is an associated or a subsidiary to Europlus Corp Sdn Bhd while the plaintiffs are the directors of WCT Engineering Bhd. These three agreements are drafted by the plaintiffs' solicitors and they are, incidentally, the solicitors representing the plaintiffs in this action.

[3] It was a term in these agreements that the defendant shall within six months from 23 January 1998 (the date of the sale and purchase agreements) redeem the said parcels (which will be referred to shortly) and deliver to the plaintiffs a letter of disclaimer failing which the defendant shall pay to the plaintiffs as purchasers 12% interest on daily rests on the purchase price from the expiry of the six months to the date of actual redemption ('the LAD).

[4] The plaintiffs purchased Parcel No F 10 at RM371,200 with LAD at RM146,323.98, Parcel No F 41 at RM328,900 with LAD at RM129,649.67 and Parcel No F 42 at RM328,900 with LAD at RM129,649.67. The total LAD came up to RM405,623.32. It was quite substantial.

[5] It is undisputed that the letter of disclaimer was dated 5 November 2001 and calculation-wise the delay was from 22 July 1998 to 5 November 2001 which came up to 1,199 days for the three units.

ARGUMENTS ADVANCED BY THE DEFENDANT

[6] It may be summarised in the following manner:

(a) that the plaintiffs are enforcing a penalty clause which is invalid in the Malaysian context and in Malaysia generally by virtue of and pursuant to s 75 of the Contracts Act 1950; and

(b) that the plaintiffs are claiming compounding interest by imposing 8% upon 12% which is said to be contrary to s 11 of the Civil Law Act 1956.

[7] In fact, these are the two salient issues for the court to deliberate upon. The determination of these two issues would dispose off the defendant's appeal in encl 13, once and for all.

[8] I shall now proceed to examine these two issues summarily.

THE FIRST ISSUE

[9] The clause which is said to be a penalty clause is found in the sale and purchase agreement between the defendant and the plaintiffs dated 23 January 1998 as seen in exh 'YYC-1' to the first plaintiff's affidavit affirmed on 2 June 2004 as reflected in encl 5 ('said clause') and I must be forgiven for reproducing the said clause:

> 2 Redemption of the said Parcel
>
> (1) The vendor (referring to the defendant) shall within six (6) months from the date hereof redeem the said parcel from the bridging financier and deliver to the purchaser(s) (referring to the plaintiffs) a letter of disclaimer (hereinafter called the 'letter of disclaimer') from the bridging financier disclaiming all rights title and interest to the said parcel and undertaking to exclude the same from any foreclosure proceedings, if any action of such a nature is instituted against the vendor (referring to the defendant) on the said lands.
>
> (2) If upon the expiry of the said six (6) months the vendor (referring to the defendant) shall fail to redeem the said parcel from the bridging financier rendering the said parcel free from all encumbrances the vendor (referring to the defendant) *shall pay to the purchaser(s) (referring to the plaintiffs) interests at twelve per centum (12%) per annum on daily rests on the purchase price from the date of expiry of the said six (6) months to the date of actual redemption* or it shall cause Europlus to pay to the purchaser(s) (referring to the plaintiffs) the said interests.

[10] Can the said clause be considered to be a penalty clause? Can we construe the said clause to be a liquidated damages clause? These are pertinent questions to pose in adjudicating the defendant's appeal in encl 13. The essential difference between penalties and liquidated damages has been lucidly explained in *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1914-15] All ER Rep 739, a decision of the House of Lords with a coram of Lord Dunedin, Lord Atkinson, Lord Parker and Lord Parmoor. There, Lord Dunedin has this to say (see pp 741–742 of the report):

> We had the benefit of a full and satisfactory argument, and a citation of the very numerous cases which have been decided on this branch of the law. The matter has been handled, and at a recent date, in the courts of highest resort. I particularly refer to *Clydebank Engineering Co v Yzquierdo y Castaneda (Don Jose Ramos)* [1905] AC 6; 74 LJPC 1; 91 LT 666; 21 TLR 58, HL; 17 Digest (Repl) 149, 489, in your Lordships' House, and *Public Works Comr v Hills* [1906] AC 368; 75 LJPC 69; 94 LT 833 (PC); 17 Digest (Repl) 149, 490 and *Webster v Bosanquet* [1912] AC 394; 81 LJPC 205; 106 LT 357; 28 TLR 271, PC; 17 Digest (Repl) 156, 532, in the Privy Council. In all these cases many of the previous authorities were considered. In view of that fact, and of the number of the authorities available, I do not think it advisable to attempt any detailed review of the various cases, but I shall content myself with stating succinctly the various propositions which I think are deducible from the decisions which rank as authoritative:

(i) Though the parties to a contract who use the words penalty or liquidated damages may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found passim in nearly every case. (ii) The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage: *Clydebank Engineering Company v Yzquierdo y Castaneda (Don Jose Ramos)*, [1905] AC 6; 74 LJPC 1; 91 LT 666; 21 TLR 58 (HL); 17 Digest (Repl) 149, 489. (iii) The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach: *Public Works Comr v Hills* [1906] AC 368; 75 LJPC 69; 94 LT 833 (PC); 17 Digest (Repl) 149, 490 and *Webster v Bosanquet* [1912] AC 394; 81 LJPC. 205; 106 LT 357; 28 TLR 271 (PC); 17 Digest (Repl) 156, 532. (iv) To assist this task of construction various tests have been suggested, which, if applicable to the case under consideration, may prove helpful or even conclusive. Such are: (a) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss which could conceivable be proved to have followed from the breach — illustration given by Lord Halsbury, LC, in the *Clydebank Engineering Company v Yzquierdo y Castaneda (Don Jose Ramos),* [1905] AC 6; 74 LJPC 1; 91 LT 666; 21 TLR 58 (H)L; 17 Digest (Repl) 149, 489. (b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid: *Kemble v Farren* (1829), 6 Bing 141; 3 Moo & P 425; 7 LJO SCP 258; 130 ER 1234; 17 Digest (Repl) 157, 546. This, though one of the most ancient instances, is truly a corollary to the last test. Whether it had its historical origin in the doctrine of the common law that, when A promised to pay B a sum of money on a certain day and did not do so, B could only recover the sum with, in certain cases, interest, but could never recover further damages for non-timeous payment, or whether it was a survival of the time when equity reformed unconscionable bargains merely because they were unconscionable — a subject which much exercised Jessel, MR, in *Wallis v Smith* (1882), 21 Ch D 243; 52 LJ Ch 145; 47 LT 389; 31 WR 214 (CA); 17 Digest (Repl) 77, 14 — is probably more interesting than material. (c) There is a presumption (but no more) that it is a penalty when:

> 'a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damages':

per Lord Watson in *Lord Elphinstone v Monkland Iron and Coal Co* (1886) 11 App Cas 332; 35 WR 17 (HL); 17 Digest (Repl) 158, 555 (11 App Cas at p 342). On the other hand: (d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties: *Clydebank Engineering Company v Yzquierdo y Castaneda (Don Jose Ramos)*, [1905] AC 6; 74 LJPC 1; 91 LT 666; 21 TLR 58 (HL); 17 Digest (Repl) 149, 489 per Lord Halsbury; *Webster v Bosanquet* [1912] AC 394; 81 LJPC 205; 106 LT 357; 28 TLR 271 (PC); 17 Digest (Repl) 156, 532 per Lord MerseyY.'

[11] That is certainly an interesting exposition of the law. In Malaysia, it seems that there is no difference between a penalty and liquidated damages and, accordingly, it would attract the provisions of s 75 of the Contracts Act 1950. The position has been lucidly stated by Thomson J in *SS Maniam v The State of Perak* [1957] MLJ 75 in this way (see p 76 of the report):

> In the first place, in this country there is no difference between penalty and liquidated damages. Section 75 of the Contract Ordinance which is the same as section 74 of the Indian Contract Act reads as follows:
>
> 'When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.'
>
> As is said in *Pollock and Mulla* on the Indian Contract Act (7th Ed, p 410) 'This section boldly cuts the most troublesome knot in the Common Law doctrine of damages.' In brief, in our law in every case if a sum is named in a contract as the amount to be paid in case of breach it is to be treated as a penalty. See *Bhai Panna Singh v Bhai Arjun Singh* AIR 1929 PC 179.

[12] To me, the distinction between liquidated damages and penalty is of no significance. It is of no legal importance simply because it is the duty of the court in either case to determine the quantum of what is the reasonable compensation to be handed out. It is wrong to say that a penalty clause is invalid by virtue of s 75 of the Contracts Act 1950. Both the liquidated damages and penalties exist side by side. In liquidated damages, there will be a genuine pre-estimate of the loss that will be caused to one party in a situation where the contract is broken by the other. It is this liquidated damages that would be recoverable and it requires no proof of actual damage (per Cotton LJ in *Wallis v Smith* (1882) 21 Ch D 243 at p 267). Whereas it is said that a penalty clause constitutes a threat held against the opposite party in terrorem; more in the nature of a security extended to the promisee to the effect that the contract will be performed. But Lord Radcliffe in *Bridge v Campbell Discount Co Ltd* [1962] AC 600 at p 622, [1962] 1 All ER 385 at p 395 has been very vocal and his Lordship has expressed his scepticism that a penalty is based on a threat in terrorem of the opposite party. Be that as it may, a penalty clause is always subject to the equitable jurisdiction of the court. So, the courts of equity would always ensure that a promisee is sufficiently compensated for his actual loss. However, there may be cases where the agreed sum may be less than the damage actually suffered yet the promisee may recover his actual loss (*Public Works Comr v Hills* [1906] AC 368 at p 375; *Wall v Rederiaktiebolaget Luggude* [1915] 3 KB 66; and *Watt, Watts & Co Ltd v Mitsui & Co Ltd* [1917] AC 227). In *Bulsing Ltd v Joon Seng & Co* [1972] 2 MLJ 43, Chua J was of the view that, in a penalty clause situation, the promisee has an option whether to sue under

the penalty clause or to sue for damages and recover damages in full. At the end of the day, it is purely a matter of construction for me to decide by looking upon and perusing the terms and inherent circumstances of each particular case viewed objectively as at the time of entering into the contract and not at the time of the breach thereof. This is the approach recommended by other judges before me in the following cases:

(1) *Dunlop Pneumatic Tyre Co, Ltd v New Garage and Motor Co Ltd*;

(2) *Lombank Ltd v Excell* [1963] 3 All ER 486; and

(3) *Phoenix Heights Estate (Pte) Ltd v Lee Kay Guan* [1982] 2 MLJ 86.

[13] Lopes J puts it rather well in the case of *Law v Redditch Local Board* [1982] 1 QB 127 at p 132:

> The distinction between penalties and liquidated damages depends on the intention of the parties to be gathered from the whole of the contract. If the intention is to secure performance of the contract by the imposition of a fine or penalty, then the sum specified is a penalty; but if, on the other hand, the intention is to assess the damages for breach of the contract, it is liquidated damages.

And the onus of showing that the specified sum is a penalty lies upon the shoulders of the party who is being sued for its recovery (*Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428 at p 1447). According to Lord Dunedin in *Dunlop Pneumatic Tyre Co, Ltd v New Garage and Motor Co* notwithstanding the fact that the parties may have used expressions like 'penalty' or 'liquidated damages' it is not conclusive and it is up to the court to decide whether it is a penalty or liquidated damages.

[14] I reiterate that it is wrong to say as was said by the defendant that a penalty clause is invalid in Malaysia in the context of s 75 of the Contracts Act 1950. In Malaysia, the distinction between liquidated damages and penalties has no significance. It has been put into oblivion by s 75 of the Contracts Act 1950 (*Choo Yin Loo v SK Visuvalingam Pillay* (1930) 7 FMSLR 135; *The Hua Khiow Steamship Co Ltd v Chop Guan Hin* (1930) 1 MC 175, 1 JLR 33; *SS Maniam v The State Of Perak*; *Wearne Bros (M) Ltd v Jackson* [1966] 2 MLJ 155; *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89; and *Wee Wood Industries Sdn Bhd v Guannex Leasing Sdn Bhd* [1990] 2 CLJ 1060). Section 75 of the Contracts Act 1950 enacts as follows:

> Compensation for breach of contract where penalty stipulated for.
>
> 75 When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation — A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception — When any person enters into any bail-bond, recognizance, or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Federal Government or the Government of any State, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation — A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

ILLUSTRATIONS

(a) *A* contracts with *B* to pay *B* $1,000, if he fails to pay *B* $500 on a given day. *A* fails to pay *B* $500 on that day, *B* is entitled to recover from *A* such compensation, not exceeding $1,000, as the court considers reasonable.

(b) *A* contracts with *B* that, if *A* practices as a surgeon within Calcutta, he will pay *B* $5,000. *A* practices as a surgeon in Calcutta. *B* is entitled to such compensation, not exceeding $5,000, as the court considers reasonable.

(c) *A* gives a recognizance binding him in a pena1ty of $500 to appear in court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

(d) *A* gives *B* a bond for the repayment of $1,000 with interest at 12 per cent. at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent. from the date of default. This is a stipulation by way of penalty, and *B* is only entitled to recover from *A* such compensation as the court considers reasonable.

(e) *A* who owes money to *B*, a moneylender, undertakes to repay him by delivering to him 10 gantangs of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 gantangs. This is a stipulation by way of penalty, and *B* is only entitled to reasonable compensation in case of breach.

(f) *A* undertakes to repay *B* a loan of $1,000 by five equal monthly instalments, with a stipulation that, in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

(g) *A* borrows $100 from *B* and gives him a bond for $200 payable by five yearly instalments of $40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.'

[15] Some critics say that in order to recover compensation in the course of the trial, the plaintiff must prove the actual damage suffered. But this would run counter to the phrase 'whether or not actual damage or loss is proved to have been caused thereby' that appears in s 75 of the Contracts Act 1950. What constitutes 'reasonable compensation' within the meaning of s 75 of the

Contracts Act 1950 must necessarily be the actual damage suffered by the plaintiff. The Federal Court in the case of *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 speaking through Peh Swee Chin FCJ who after going through some Indian precedents held that proof of damage or loss was necessary.

[16] In short, *Selva Kumar* requires an injured party to prove his actual loss and it is depriving him of the very benefit a liquidated damages clause was intended to confer viz, recovery without proof of actual loss. According to Mr. Seah Ban Kiat, the learned counsel for the defendant, who hails from the law firm of Messrs Yeap & Yong, that *Selva Kumar* bears grave implications for the construction industry since an injured party must prove his actual loss for late completion notwithstanding the liquidated damages clause. The Federal Court in *Selva Kumar* held that:

(1) by reason of s 75 of the Contracts Act 1950, a liquidated damages clause is deemed to be penal and therefore invalid except as a ceiling for recovery. Accordingly, the sum expressed as liquidated damages cannot, in and of itself, be automatically recovered by the injured party;

(2) so much so that even if a contract has a liquidated damages clause, an injured party must still prove his actual loss, for instance, an employer must prove his actual loss for late completion;

(3) but, if it is very difficult for the injured party to prove his actual loss because there is 'no known measure of damages employable' for the breach in question then his claim would not fail. Instead, s 75 of the Contracts Act 1950 would permit him to recover a 'reasonable compensation' which is 'reasonable and fair according to the court's good sense and fair play' capped at the value of the sum expressed as liquidated damages; and

(4) that the relevant words in s 75 of the Contracts Act 1950 that permits the injured party to obtain recovery despite being unable to prove his actual loss are the words 'whether or not actual damage or loss is proved to have been caused thereby'. These words are therefore to be narrowly interpreted and should not be taken to mean that an injured party could simply deduct the liquidated damages by using a liquidated damages clause without having to prove his actual loss.

[17] It is appropriate, at this juncture, to reproduce the speech of Peh Swee Chin FCJ in *Selva Kumar* (see p 828 of the MLJ report):

> It would still be left to the good sense and fair play of the court to fix a reasonable amount as compensation. Thus, it will mean that for lack of an established measure of damages in any particular case, that case will be one in which the court finds it difficult to ascertain the amount of actual loss or damage. The court will not shirk its duty, however, when such actual loss or damage is manifested from the evidence and it is not too remote, to find a reasonable sum for the plaintiff.

[18] Continuing at pp 828–829 of the MLJ report in the case of *Selva Kumar*, Peh Swee Chin FCJ expressed his views thus: **A**

> Thirdly, therefore, we hold that the precise attributes of such contracts in which it is difficult for a court to assess damages for the actual damage or loss, are cases where there is no known measure of damages employable, and yet the evidence clearly shows some real loss inherently and such loss is not too remote; then the court ought to award, not nominal damages, but instead, substantial damages not exceeding the sum so named in the contractual provision, a sum which is reasonable and fair according to the court's good sense and fair play. **B**
>
> Fourthly, we hold that in any case where there is inherently any actual loss or damage from the evidence or nature of the claim and damage for such actual loss is not too remote and could be assessed by settled rules, any failure to bring in further evidence or to prove damages for such actual loss or damage, will result in the refusal of the court to award such damages, despite the words in question. **C**

[19] The learned counsel for both the plaintiffs by the name of Miss Jashirita binti Mohd Bashir from Messrs Yip & Co submits with vigour and vitality that the facts in *Selva Kumar* are different from the facts of the present case. According to her, in *Selva Kumar*, the clause pertaining to the liquidated ascertained damages was unreasonable because the said clause stated that in the event the purchaser defaulted, all monies paid by the purchaser may be forfeited by the vendor. There, according to her, the vendor sought to forfeit all the monies paid by the purchaser which was 80% of the purchase price. Therefore, according to her, surely the Federal Court in that case was minded to find that s 75 of the Contracts Act 1950 would not apply in the strict sense of the word. She emphasised that the case of *Selva Kumar* was a case concerning the sale and purchase of a medical practice. And that the Federal Court was of the opinion that the respondent would have proved the actual loss or the damage that he has suffered, for example, the use of medical equipments at the clinic. But, unfortunately, according to her, the respondent has failed to do so and, consequently, the Federal Court was unable to quantify any award of damages to him. **D** **E** **F** **G**

[20] I am attracted to the case of *Sakinas Sdn Bhd v Siew Yik Hau & Anor* [2002] 5 MLJ 497, a decision of Abdul Aziz Mohamed J (now JCA). That case would be more relevant and appropriate in adjudicating the present appeal at hand. It was a construction related case and it involved purchasers of a condominium apartment. The agreement was in accordance with reg 11 of the Housing Developers (Control and Licensing) Regulations 1989 read with Schedule 'H' thereto and they were made under the Housing Developers (Control and Licensing) Act 1966. It was in the nature of a mandatory contract for the sale and purchase of the condominium apartment. The developers defaulted and failed to hand over vacant possession of the condominium apartment in time and there was also a corresponding failure to complete the common facilities in time. In both situations, the delay came up to 336 days **H** **I**

calculated from the date when vacant possession should have been delivered to the date when it was actually delivered. Liquidated damages would accrue for each day that the developers were late in delivering. The developers achieved completion a year late. So, the liquidated damages accumulated in the purchasers' favour came up to the tune of RM18,447.78. The purchasers sued for this sum. Under *Selva Kumar*, the purchasers could not rely on the liquidated damages clause as it was held to be invalid. Instead, the purchasers had to prove their actual losses in relation to the developers' breach which was the question of late completion. This, according to the developers, the purchasers had failed to do. Since the purchasers had not adduced evidence of the actual losses suffered by them as a result of the delay in completion, the purchasers therefore could not recover the sum of RM18,447.78. The learned judge in the person of Abdul Aziz Mohamed J (now JCA) disagreed. His Lordship, in the course of applying *Selva Kumar*, acknowledged that the purchasers were indeed required to prove their actual losses. But his Lordship held that while the purchasers had not adduced any evidence of their actual losses for late completion, it did not matter because the purchasers did not have to. According to his Lordship late completion was a species of breach for which 'no known measure of damages was employable' (see p 516 of the report) and that it simply came down to what the court would decide was a fair amount to be paid as 'reasonable compensation'. Again, in *Sakinas*, his Lordship found that the full value of the liquidated damages to be 'reasonable compensation'. This was what his Lordship said at p 516 of the report:

> For those reasons, I am of opinion that a case of delay in completion such as the present case should be treated as belonging to the first class of cases, which does not require proof of actual damage or loss. There has to be real loss that is not too remote, but it is difficult for the court to assess the actual loss because there is no known measure of damages employable. What the court needs to determine, in the absence of proof of actual loss, is what is the reasonable compensation, applying good sense and fair play.'

[21] It must be emphasised that his Lordship in *Sakinas* appreciated that any delay in the building industry would bring about dire consequences. His Lordship considered that delays in completion were considered as a species of breach for which 'no known measure of damages was employable' because a complex cocktail of losses was involved, including financing charges, rental expenses, loss of profit and loss of use and enjoyment. At pp 515–516 of the report, his Lordship made the following salient observations:

> In a great number of cases in this country, home ownership is acquired through purchase from housing developers with the help of financing from financial institutions on the security of the property. The developer is paid the purchase price in specific stages according to the progress of construction. If there is a delay in the completion of the construction, the purchaser may suffer in various ways. He may have to commence paying the loan instalments without getting the enjoyment of the house. If he is renting a house, he will have to pay both the rental and the loan

instalments, whereas if there had been no delay in completion, he could have moved into his new house and pay the loan instalments, without also having to pay rental. If he bought the house as an investment, he would have been deprived of the rental that he would have got from renting out the house. The person who is already living in his own house but is hoping to live in a better new house, and rent out his present house, will be deprived of early enjoyment of the new house and the receipt of rental from his present house, while having to pay his loan instalments. Whatever may be the circumstances and intention of the house buyer, it can be said that in every case, a delay in completion would deprive the purchaser, for the period of the delay, at least of the rental that he would have got from the house had he chosen to rent it out. It would be a substantial loss in theory. But how can he prove what the rental would be for the house, in the area and at the particular time, if, for example, the whole project is delayed so that there is no case on which to base a fair comparison?

Depending on the skill with which a claim is fought, a trial of the question of rentability may result in different awards of compensation in respect of different properties in the same housing development, whereas the delay suffered is the same. Moreover, there is the element of hardship in the case, for example, of the person who would have to pay both the rental of his present accommodation and the loan instalments. If there were no delay, he would have to pay only one thing. He is a man living on a tight budget. He wil1 have to suffer something from having to pay for two things. How will his suffering be quantified?

[22] Miss Jashirita Mohd Bashir for both the plaintiffs correctly submits that the learned judge in *Sakinas* had judiciously summarised the judgment of the Federal Court in *Selva Kumar*. In fact, the learned judge in *Sakinas* was of the view that the Federal Court in *Selva Kumar* did not decide that in every case falling under s 75 of the Contracts Act 1950 that there must be proof of actual loss or damage. The learned judge in *Sakinas* divided the class of cases into two categories, viz:

(1) if there was no evidence of actual damage or loss, the court ought nevertheless to award substantial damages not exceeding the sum so named in the contractual provision, being a sum which was reasonable and fair according to the court's good sense and fair play. In such cases, the evidence must clearly show some real loss inherently and that such loss was not too remote but that it would be difficult for the court to assess damages or the actual damage or loss because there was no known measure of damages employable; and

(2) where the damage for such loss was not too remote and could be assessed by settled rules. In such an event, the failure to bring in further evidence or to prove damages for such actual loss or damage would result in the court's refusal to award such damages despite the plain words of the section, namely, 'whether or not actual damage or loss is proved to have been caused thereby'.

[23] Miss Jashirita Mohd Bashir submits further and she painstakingly drew my attention to the decision of the learned judge in *Sakinas*. She uses *Sakinas* as a guideline and she submits along the following lines. That the present defendant had failed to redeem the properties as agreed in the agreements and the defendant too had subsequently failed to deliver the letter of disclaimer to the plaintiffs. According to her, the defendant did not dispute all these facts. On the other end of the scale, Mr Seah Ban Kiat for the defendant reiterated that the sale and purchase agreements were 'set-off' agreements for the purpose of setting-off against all the debts due from the defendant's subsidiary and/or associate to the plaintiffs' company. Mr Seah Ban Kiat emphasised and laid stress that there was no evidence shown by the plaintiffs to show that the plaintiffs have suffered loss of use of the amount due and that the 12% interest constituted the measure of damages suffered by the plaintiffs. By way of a rebuttal, Miss Jashirita Mohd Bashir has this to say. That the plaintiffs agreed to 'purchase' the properties from the defendant as a set-off against all the debts owed to the plaintiffs. That being the case, it would be obvious that there are monies due to the plaintiffs from the defendant. Consequently, according to her, there was no need for the plaintiffs to show any loss because the failure on the part of the defendant to comply with any of the terms of the agreements were detrimental to the plaintiffs. Furthermore, the failure on the part of the defendant to redeem the properties within the time stipulated in the agreements had deprived the plaintiffs of the enjoyment of the properties bearing in mind that the properties were supposed to pay off the debts of the plaintiffs. The same failure on the part of the defendant had deprived the plaintiffs of the use of the monies that were owed to them.

[24] Proceeding ahead, Miss Jashirita Mohd Bashir submits further along these lines. That the agreement to set-off the debts due was basically a business decision by the plaintiffs. It must be borne in mind that the plaintiffs might have agreed to purchase the properties so that they could recover the monies owed to them by renting out these properties or even by selling them to a third party. But the failure on the part of the defendant to redeem the properties had deprived the plaintiffs of adopting these options. It was said that if the plaintiffs have not agreed to purchase the properties but instead had insisted that the debts be settled in monetary terms, then the payments received would have been used for various other investments or purchases. However, what sort of investments or purchases were open to the plaintiffs at that particular point of time? How could the plaintiffs quantify the damage that they have suffered since there is no known measure to do so? How could the plaintiffs know what would be the rental rate for the properties at that particular point of time and for that particular area? How could the plaintiffs show their losses by way of physical evidence in the aforesaid circumstances?

[25] The answers to all these questions are quite apparent. The plaintiffs do not have to show any proof of loss or damage because the plaintiffs' claim

against the defendant falls under the first class of cases as postulated by Abdul Aziz Mohamed J (now JCA) in *Sakinas* in that where there was no evidence of actual damage or loss, the court ought, nevertheless, to award substantial damages not exceeding the sum so named in the contractual provision being the sum which was reasonable and fair according to the court's good sense and fair play. Here, there are some real loss inherently and that such loss was not too remote. However, it would be difficult for the court to assess damages or the actual damage or loss because there was no known measure of damages employable.

[26] In construing s 75 of the Contracts Act 1950, I must accord it a literal, plain and ordinary interpretation. According to that section if an amount is named in a contract as an amount to be paid in case of a breach or if the contract contains any other stipulation by way of a penalty, then the party complaining of the breach is entitled to receive a reasonable compensation not exceeding the amount so named or the penalty stipulated therein. This is so irrespective of whether or not actual damage or loss is proved to have been caused or incurred. Consequently, I must give effect to the said clause entered by the parties thereto.

[27] It must be remembered that, 'where the words of an Act of Parliament are clear, there is no room for applying any of the principles of interpretation which are mere presumptions in cases of ambiguity in the statute' (per Scott LJ in *Croxford v Universal Insurance Co* [1936] 2 KB 253, at p 281). According to Donaldson J in *Corocraft v Pan-Am* [1969] 1 QB 616, at p 638, 'the duty of the courts is to ascertain and give effect to the will of Parliament as expressed in its enactments'. And according to Lord Parker CJ in *Capper v Baldwin* [1965] 2 QB 53, at p 61, the function of the court is to interpret an Act 'according to the intent of them that made it and the intention must be deduced from the language used'. Lord Goddard CJ in *Barnes v Jarvis* [1953] 1 WLR 649 aptly said:

> A certain amount of common sense must be applied in construing statutes. The object of the Act has to be considered.

[28] Tindal CJ in *Warburton v Loveland* (1832) 2 D & Cl (HL) 480, at p 489 succinctly said:

> Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature.

[29] These were the approaches adopted by these learned judges when confronted with the problems related to construction of the Acts of Parliament and these approaches, though simple and straightforward, should be heeded to and they serve as useful guidelines.

[30] It is now an elementary rule of construction that the words and phrases of a technical legislation are used in their technical meaning, if they have

acquired such a standing, and that otherwise it would be construed according to their ordinary meaning (*R v Commissioners of Income Tax* (1888) 22 QBD 296; and *Victoria City Corp v Bishop of Vancouver Island* [1921] 2 AC 384). Another elementary rule of construction is this. That the phrases and sentences are to be construed according to the rules of grammar (*R v Ramsgate (Inhabitants)* (1834) 1 A & E 136). However, a literal construction is certainly a preferred choice because according to Lord Warrington of Clyffe in *Barrell v Fordree* [1932] AC 676, at p 682:

> The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases.

[31] Now, in giving effect to the said clause, I gave prominence to the warning of Lord Wensleydale in the case of *Monypenny v Monypenny* (1861) 9 HLC 114, at p 146 when his Lordship said:

> … the question is not what the parties to a deed may have intended to do by entering into that deed, but what is the meaning of the words used in that deed: a most important distinction in all cases of construction and the disregard of which often leads to erroneous conclusions.

[32] In *Kidder v West* (1684) 3 Lev 167, the court remarked that it 'cannot understand the true intent of an indenture but only the words of the indenture.' For my part, I subscribed fully to the interpretations placed on the said clause by Miss Jashirita Mohd Bashir.

[33] In any contract, there is always a chance that the contract may not be adhered to by either party. If that happens, the injured party may seek monetary damages. Money is the root of all evil and it is monetary compensation that the injured party is seeking for. It is solely to compensate the injured party and not to punish the contract-breaker. The quantum of the monetary damages is always dependent on the evidence as adduced by the injured party. Once the latter has proven his loss, the court will quantify his damages in monetary terms so far as money can put him in a position like as though the contract had been performed. It would be an exacting exercise for the injured party to prove his monetary damages. The contract-breaker will definitely resist and challenge every iota of evidence advanced by the injured party. It is this kind of difficulty that the liquidated damages clause comes into the picture. The liquidated damages clause will smoothen the evidential path of the injured party. A fixed sum is set and the injured party is thereby entitled to it. There is nothing illegal about liquidated damages. They are legally valid. Its sole purpose is to compensate the injured party for his loss and proof of actual loss is dispensed with.

[34] But if an injured party fixes a sum of money not as a compensation but rather as a punishment, then it will not be considered as liquidated damages but rather as a penalty. Penalties, some critics say, are legally invalid because

they serve to punish the contract breaker and not to compensate the injured party for his loss. Section 75 of the Contracts Act 1950 does not render invalid a penalty clause and the injured party too is entitled to a reasonable compensation or the penalty as specified therein 'whether or not actual damage or loss is proved to have been caused thereby.' But it is the Federal Court in *Selva Kumar* that held that proof of damage or loss was necessary. *Selva Kumar* certainly has caused heartache to an injured party. After *Selva Kumar*, the injured party will be deprived of benefitting under the liquidated damages clause, namely, recovery of actual loss without proof. So, in a construction contract for instance, the injured party will have to prove his actual loss for late completion notwithstanding the liquidated damages clause. I did say that in construing an Act of Parliament, by reference to some authorities from other jurisdictions, there was a need to give effect to the will of Parliament no matter what the consequences may be. And the need is still there when construing s 75 of the Contracts Act 1950. Will *Selva Kumar*, decided in the context of the sale of a medical practice, be rigidly applied by the courts in Malaysia in a construction dispute? It seems that the courts are moving away from *Selva Kumar* and *Sakinas* is a classic example of it. The learned judge in the person of Abdul Aziz Mohamed J (now JCA) in deciding *Sakinas* was ever ready to consider the issue of delays in construction projects as a species of breach for which 'no known measure of damages is employable'. That is certainly laudable. As I see it, the only way to avoid the impact of *Selva Kumar* is to vary the legal consequences spelt out by *Selva Kumar* in the context of s 75 of the Contracts Act 1950. It can be done provided both the parties are agreeable to circumvent the rigours of *Selva Kumar*. What both the parties should agree to would be:

(1) that they would agree to redeem the value of the liquidated damages to be the injured party's actual loss; and

(2) that they should agree to dispense with the need to prove the injured party's actual loss.

[35] That the parties are entitled to freely enter into an agreement or bargain as equals cannot be doubted. It is not the duty of the court to dictate the terms of the contract to the parties. It is the parties themselves that should decide what are the terms that they should be bound to. This approach is consistent with the idea that contracts should be made by the parties themselves. It is an approach that is known as the freedom of choice. It is certainly consonant with the concepts of a free market economy and the spirit of competition. A contract is a legally enforceable agreement giving rise to obligations for the parties. But not all agreements are legally binding contracts and no legal system in the world would enforce all agreements. There must be the requirement of consideration which is fundamental to a contract (*ReHudson* (1885) 54 LJ Ch 811). The contract must be complete in the sense that there must be a concluded contract (*Pagnan SPA v Feed Products* [1987] 2

Lloyd's Rep 601). So, once there is a concluded contract to circumvent the rigours of *Selva Kumar* the parties are legally bound to honour it and the courts are duty bound to enforce it.

[36] In the context of adjudicating the present appeal in enclosure 13, with particular reference to the first issue, it must be borne in mind that the plaintiffs' stand right from the very beginning were that the said clause was not a penalty clause and that the plaintiffs were not required to prove the losses suffered by them before they could claim the monetary damages. Even if the said clause is said to be a penalty clause the plaintiffs do not have to prove the losses that they have suffered before they could claim the monetary damages because the so called penalty clause was a term of an agreement entered into mutually between the plaintiffs and the defendant and thus, under the law, binding and enforceable against both the parties. This was my judgment and I so hold accordingly.

THE SECOND ISSUE

[37] It is now settled law that the plaintiffs could claim for pre-judgment and post-judgment interests. In regard to the post-judgment interest, from the date of judgment until the date of realisation the plaintiffs are entitled to 8% on the judgment debt computed and comprised of the principle sum plus the judgment interest pursuant to O 42 r 12 of the RHC. This part of the plaintiffs' claim is a non-issue. It is in regard to the pre-judgment interest that the defendant is now alleging that the plaintiffs are not entitled to.

[38] It must be borne in mind that what the plaintiffs are claiming against the defendant is for damages for breach of the agreements. The 12% of the purchase price claimed by the plaintiffs are not interest per se, rather it was more of a quantum on which the damages are calculated upon. In *Sarwari a/p Ainuddin v Abdul Aziz a/l Ainuddin* [2000] 5 MLJ 391, Mahadev Shankar J (ashe then was) in his judgment made reference to the case of *Bushwall Properties Ltd v Vortex Properties* [1975] 2 All ER 214 at p 225 and I likewise, with respect, would follow suit. The passages relied upon by his Lordship Mahadev Shankar J (as he then was) can be seen at p 399 of the MLJ reporting and I must reproduce them accordingly:

> Although what is claimed here is simply a replacement of a sum of money, the quantum of which is calculated by reference to interest which the plaintiffs have had to pay, the sum so claimed is not in any relevant sense interest itself; it is the sum payable by way of damages for breach of contract, and I see no reason why it should not be capable of carrying interest in the ordinary way.
>
> In my judgment, therefore, the discretion conferred by the 1934 Act remains exercisable. In as much as the plaintiffs have had to incur payments which have depleted their general funds, or have lost the use of money which would, had it not been paid out for the immediate purchase, have produced an addition to their

general funds by way of interest earned, which addition would itself have been available to earn interest, I do not see why in principle interest under the 1934 Act should not be awarded ….

[39] In short, the plaintiffs are not claiming compound interest as alleged by the defendant but rather the plaintiffs are claiming the interest of 8% upon the 12% of which they are entitled to.

[40] Reference to the case of *Pusat Bandar Damansara Sdn Bhd & Anor v Yap Han Soo & Sons Sdn Bhd* [2000] 1 MLJ 513 (CA) is certainly ideal. There Siti Norma Yaacob JCA (now Chief Judge of Malaya) writing a separate judgment has this to say about interest that has been levied (see p 524 of the report):

To bring that increased or penalty interest within the ambit of s 75, it must first be shown that it was excessive in nature. The fact that it was an agreed penalty interest as opposed to one that was fixed unilaterally by the appellants, lends support to my conclusion that it could not have been that excessive to enable the respondent to agree to that rate of interest to be charged. On that reasoning the respondent cannot now be heard to complain that the rate of 19% pa on all instalments due as at 30 June 1990, is excessive and under those circumstances that rate of interest cannot be caught by s 75.

And Mokhtar Sidin JCA writing a concurring judgment echoed the same sentiments as reflected at p 531 of the report:

There is no doubt in our minds that the extra 13% on the balance of the purchase price was the penalty to be imposed. Section 8.01 of the agreement provided for such imposition and this was agreed upon by the parties. The respondent knew of the penalty clause when it signed the agreement. The amount claimed by the appellants for penalty did not exceed the amount provided for by the agreement. Section 27 allowed the appellants to claim for such an amount without any proof of damages suffered by the appellants. For that reason we found the judge had erred in his computation when he rejected the appellants' claim for penalty. The appellants were entitled to impose the penalty until the date of termination.

[41] In my judgment, even if the said clause is construed as a penalty clause, it is still binding upon the parties because both the parties have agreed to it. Similarly the liquidated damages clause in this appeal should also be allowed because it was a term of the agreements entered into mutually by both parties regardless of whether it is a default clause as stated in the agreements or it is indeed a penalty clause as claimed by the defendant.

CONCLUSION

[42] The upshot of it all would be this:

(1) That the plaintiffs are not trying to impose a penalty clause as the said clause is a term of the agreements mutually entered between the plaintiffs and the defendant.

(2) Even if the said clause is a penalty clause as claimed by the defendant, the plaintiffs are still entitled to claim for the monetary damages without proof of loss suffered by them because the said clause itemising the interest is a term of the agreements agreed upon by both the parties thereto. Recently in *RHB Sakura Merchant Bankers Bhd v Tan Sri Dato' Ting Pek Khiing (No 1)* [2004] 5 MLJ 315, at p 324, I said as follows:

[13] And flowing from that, it can be inferred that cl 3.1 of the share sale agreement remains binding on the defendant and the plaintiff is therefore entitled to charge the compound interest until full settlement of the amount outstanding. It is germane to mention that the courts have consistently held that interest which has been contractually agreed upon are valid and binding on the contracting parties. The following cases would suffice:

(1) *Foo Yoke Foon v Public Bank Bhd* [2000] 3 MLJ 728 (CA);

(2) *Pusat Bandar Damansara Sdn Bhd & Anor v Yap Han Soo & Sons Sdn Bhd* [2000] 1 MLJ 513 (CA);

(3) *Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ 17 (FC); and

(4) *Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd (In receivership)* [1996] 2 MLJ 461 (FC).

[14] In *Realvest Properties Sdn Bhd*, the Federal Court declared as void default interest if made payable from the date of contract as distinct from the date of default. Here, the defendant had defaulted in making payment of the amounts due as at 30 April 1998 under the supplemental agreement. That being the case, the plaintiff was certainly entitled to impose the default interest for the amounts outstanding at any time after 1 May 1998. This was my judgment and I so hold accordingly.

[43] For all these reasons, I dismissed the defendant's appeal in encl 13 with costs. I also ordered that the case management should proceed on 9 September 2005.

Defendant's appeal dismissed with costs.

Reported by AG Kalidas